LORD ST. LEONARDS.—I thought it was clearly understood, that if the House reversed the decision, still the case must be remitted. I stated that several times during the argument.

Mr. Anderson.—I apprehend there will be a power to the Court to deal with the question of expenses.

LORD ST. LEONARDS.—No; that is not the habit of this House. I do not recollect any instance of it.

Interlocutors reversed, and cause remitted.

First Division—Adam Burn, *Appellant's Solicitor.*—Nicholson and Parker, *Respondent's Solicitors.*

APRIL 12, 1853.

GEORGE FRASER, *Appellant, v.* WALTER HILL and others, *Respondents.*

Partnership—Jury Cause—Issue—Bill of Exceptions—Pawnbroker—Statute 39 & 40 Geo. III. c. 99—*In an action of reduction, count, reckoning and payment, against the representatives of F., an issue was sent to a jury which involved a question, whether F., whose name did not appear in the licenses of a pawnbroking establishment, or over the door, or on the tickets, was a partner of the concern.*

HELD (reversing judgment), *that the two questions for a jury, there being no partnership deed, were* (1) *whether there was a partnership at all;* (2) *if so, then whether it was part of the contract, that F.'s name should not appear, in which case the contract would be void.*[1]

The pursuer appealed, pleading that the judgment of the Court of Session should be reversed on the following grounds:—1. As the 4th exception (being the only one now in question) raised no principle of law, and was not submitted for the opinion or direction of the Judge who presided at the trial on any matter of law or otherwise, it was erroneously sustained. 2. That exception ought to have been disallowed, in respect that, if sustained by the presiding Judge, the province of the jury would have been invaded, as the issues of fact sent to them for trial would have been thereby withdrawn from their consideration.

The respondent supported the judgment on the following ground:—Because, on the facts proved, there was no lawful partnership between the appellant's father and Alexander Hair, in the business of pawnbrokers, between the years 1840 and 1844, and the jury ought to have been directed accordingly.

Sol.-Gen. Bethell and *Bramwell* Q.C., for appellant.—The sole point in dispute between the parties, as disclosed in the pleadings, was, whether the violation of the law was the result of the agreement between Hair and the appellant at the time of making the contract. The issues do not exactly raise this point, for we can suppose the jury to have well found for the appellant on all these issues, even though it were true that the partnership was illegal. It is clear that the property of the appellant could not be transferred to Hair by the mere force of the Pawnbrokers' Statute, and therefore it might be fraudulent in Hair to convey such property away, even though the partnership was illegal. It was not necessary to the appellant's title, therefore, that the partnership should have been valid. The existence of a partnership *de facto*, however, as between Hair and the appellant, was *res judicata*, and the other defenders, in their defences, admitted that fact. The first issue, nevertheless, involves the question, whether there really had been a partnership, but yet leaves it ambiguous whether that question was intended to be raised. Such a pleading would have been bad in English law, as involving a negative pregnant. We may, however, consider the allusion to partnership property in that issue, as used merely for identification. But, at all events, there were substantially two questions to be tried—1. whether there was a partnership *de facto;* 2. whether it was a legal partnership. Now, there was evidence on both sides at the trial, and the 4th exception was tendered to the Judge's summing up. The first objection to the exception is, that it is too vague. An exception ought always to be precise enough to allow the thing complained of to be remedied before it is too late—*Bain* v. *Whitehaven, &c. Co.*, 7 Bell's App. C. 79; 22 Sc. Jur. 483. This exception may mean, either that there was no partnership *de facto*, or that it was unlawfully carried on. Now the cases establish, that an agreement to carry on a partnership in pawnbroking, secretly as to one partner, is unlawful, and also that the mere carrying it on in an unlawful way, though evidence of a contract so

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[1] See previous reports 14 D. 335; 24 Sc. Jur. 162. S. C. 1 Macq. Ap. 392; 25 Sc. Jur. 391.

to carry it on, yet does not make it an unlawful contract—*Armstrong* v. *Armstrong*, 3 Myl. & K. 45.

[LORD CHANCELLOR.—Yes, it is evidence, but nothing more than evidence.]

It is no doubt very strong evidence; and we say the facts of the appellant's name not appearing on the door, or in the license and tickets, were strong evidence to go to a jury. But then the respondents say, that the Judge should have told the jury that they must find there was an illegal contract on such facts as proved. How can we say the jury were wrong if they found there was no illegal partnership?

[LORD CHANCELLOR.—How could the Judge know whether the jury might not believe some parts of the evidence, and not believe other parts?]

That is what we say. It was for the jury to say, on the whole evidence, what was the nature of the partnership—whether it was a part of the original contract, that the appellant's name should be concealed. The proposition only requires to be stated, to be at once admitted. As to *Gordon* v. *Howden*, 4 Bell's App. C. 254, the contract appeared *ex facie* of the deed of partnership;—here it was to be inferred from all the facts, which makes all the difference.

Lord Adv. Moncreiff and *Inglis D.F.*, for respondents.—The sole ground of this action was the lawfulness of the contract of partnership, for if the conduct of the parties in concealing one of the partner's names was illegal, no action could lie. The question was, therefore, whether there was a legal partnership under the Pawnbrokers' Act, 39 & 40 Geo. III. c. 99, § 23. The issues, taken along with the record, raise that question as distinctly as it could be raised. That there was a partnership *de facto*, was not admitted by us, though it might have been held established as between Hair and the appellant, but we alleged entire ignorance of such a fact. Now, as there was no deed of partnership, the terms of it could only be a matter of inference. Accordingly, it came out of the appellant's own witnesses, that his name was not over the door, nor in the license, nor the tickets. Assuming, therefore, there was a partnership *de facto*, what possible inference could there be from these three facts but this, that it was one of the stipulations of the contract to keep the appellant's name secret. This inference was irresistible; it was a *presumptio juris et de jure*, and as such, it was a question, not for a jury, but for the Judge—*Gordon* v. *Howden*, *supra*. In an analogous case—*Mitchell* v. *Williams*, 11 M. & W. 216—it was held, that it was for the Judge, and not the jury, to say whether the prosecutor had reasonable and probable cause for laying an information. As to the objection of vagueness, the exception clearly enough points out the unlawfulness of the contract as the point to be laid down; and it was duly taken.

LORD CHANCELLOR CRANWORTH.—My Lords, I should be very reluctant generally, in deciding cases that come before your Lordships' Court, to have it supposed that I had any wish to cut the matter at all short, and not to hear everything that could he said, as well for, as against, the judgment of the Court below. But I confess, that having attended to this point during the argument—which point lies in the very narrowest possible compass—my mind is so thoroughly made up, that, so far as I am concerned, it would be nothing but a mere pretence to listen to any further argument upon the subject. I have the less difficulty in dealing with this case, in this somewhat apparently hasty manner, on account of the nature of this decision, because it is a decision on a subject with which, with all due deference to the very learned Judges of the Court of Scotland, I may say that they are not so familiar as the learned Judges who preside in the Courts of this country; and had they been so, I cannot but think the error into which I conceive they have fallen, could not by possibility have occurred.

My Lords, the question arises in this way. It was an action of count and reckoning instituted in the Court of Session by Fraser, who is the appellant, against Hill the respondent;—and his complaint is this—that he having been from 1844 a partner as a pawnbroker with Hair, about that time, or in the early part of 1845, Hair, acting fraudulently towards him, assigned over to certain other persons, Hill and Sinclair, the partnership stock, admitting them into partnership, and ousting, or endeavouring to oust, him (Fraser) from a participation in the profits of the concern in which he was jointly interested with Hair. The object of the suit was to call to account those persons who had thus been taken into partnership by this fraudulent assignment, it being alleged that they were cognizant of the interest that Fraser had in the property. The subject matter of the property was that of a pawnbroker—and of this there can be no question, that it is an illegal thing for any person to carry on the business of a pawnbroker, without having his name disclosed. So that if A and B are trading in partnership as pawnbrokers, they incur penalties at every step if they carry on the business in the name of A only. I do not know whether the penalties attach to one only, or to both of them—probably to both. The necessary corollary from that is, that no contract made so to carry on the business of a pawnbroker, can be a valid contract—it being to do an illegal act. So that it is a contract which no court of law will recognize as having any validity.

Now, the defence set up to Fraser's demand in this suit of count and reckoning, was, that the pawnbroking business was a partnership, and that it had been carried on as a partnership, upon a contract that Fraser's name was not to appear. That was the substance of the defence, and

that was the matter proceeded on eventually—it being a question purely of fact; and certain issues were directed, which, it is supposed, would raise, and which in fact did raise, the whole question in dispute.

My Lords, the first is the only issue to which I need direct your attention—for that issue raises the whole question; and the question to be decided was, whether the partnership deed was a fraud, by reason of its being a contrivance to transfer to the new partners that property in which Fraser the appellant had an interest. According to the argument made at the bar, I doubt whether, according to the older forms of proceeding in this country, such an issue could have been endured, because it raises a sort of "negative pregnant," viz. whether there is a partnership or not. That is, in a bye way, raised there. But I will assume that that is all got over, and that substantially it raised this question, whether their act of partnership was a legal partnership; and if it was, then whether the deed was wrongous and fraudulent as between Hair the assignor, and Fraser the present appellant—supposing that issue properly raises both those questions.

The case comes to trial, and at the trial, a number of witnesses are called on the part of Mr. Fraser the pursuer, for the purpose of shewing—*first*, that there was a partnership, and a legal partnership; and the way in which he attempts to prove that is this. He calls a number of witnesses, whose testimony was referred to by the Lord Advocate, who all state the fact, that in substance he did appear as a partner—some speaking with more, and some with less, distinctness. Robert Steel says—"I have heard both"—that is, both Fraser and Hair—"talk of it. It was quite well known they were partners. They had a lawsuit about it. Hair remained in possession after that, and a while after he gave it up. I had conversations with Hill before the dispute or law plea. Hill said Fraser was a partner with Hair, but had denuded himself by not having his name in the license. He often talked about it, and he knew well they were partners. It was publicly known." James Hamilton speaks much to the same effect; and several other witnesses state the same thing.

Now, the first question is, if this were not a pawnbroking concern, but some other concern in which there was no necessity for the name appearing, do these facts, thus proved, satisfy you, the jury, that there was a partnership at all? There were no partnership articles—nothing but these circumstances, from which you, the jury, may or may not infer that there was a partnership. Now, do they, or do they not, satisfy you of that? If they do not, there is an end of the case—there was no partnership at all. Consequently, it was no fraud to transfer the property, in which, in that state of things, it would be quite obvious that Fraser had no interest. But, secondly, in the present case, it raises the question, by reason of its being a trade that required the name of every one in it to appear in order to make the transactions lawful, if Hair and Fraser were partners, was it part of the original agreement that Fraser's name was to be concealed? That is to be inferred or not from all the circumstances in the case. One of the most important facts, to lead to the inference that it was part of the original contract, is the fact, that from the beginning to the end, Fraser's name never once appeared. It never appeared over the door, according to the evidence at least; it never appeared on the pawnbroking tickets; and it never appeared in the licenses. I think that the conclusion from that may be very reasonably drawn as a matter of fact, that it was part of the original contract. But that is the point to be decided. The question is, whether that is a question of fact, to be decided by the jury, or a question of law, to be determined by the Judge. There cannot be the least doubt that it is a question of fact for the jury. And what the Judge should have done, and I daresay what he did—what any Judge would have done, if asked by both parties—was to point all that out to the jury. I presume that he did so—that he pointed out first of all that the question was: are you satisfied that Mr. Fraser was a partner at all? And then, if you are satisfied that he was a partner, are you satisfied that it was or was not a part of the original terms or stipulations of the contract, that his name should be concealed—that he should, in short, be a secret partner? That is the course which the learned Judge should have pursued, and that, I take it for granted, from the course which the transaction took, is the course which he did pursue. But then, instead of that, what is suggested by the learned counsel for the respondent, (that is, the defender in the Court below,) is, that the Judge was bound to state that, upon the facts proved, there was no legal partnership between the pursuer and Hair in the business of pawnbrokers. If he had so laid down, I think I may state without the least fear of contradiction, that, upon exception to such ruling, it would not have borne argument. The Judge had no right to say, upon the facts proved leading to a particular conclusion of fact, that that conclusion is or is not established. That was for the jury to say. It would have been an error on the face of the record if he had stated that, his not stating which forms the ground of the present exception.

My Lords, it was urged that there is an analogy between this case and a case which frequently occurs in the Courts of Common Law in this country, in which this course is not only taken, but is one which the Judges are bound to take—namely, the course that it is now suggested that the Judge ought to have taken in this case. For that purpose the learned Lord Advocate cited *Mitchell* v. *Williams*, *supra*, where it was established that the Judge did right, in the case of an action for false imprisonment, or a malicious prosecution, I think, in laying down to the jury as

a matter of law, that there was probable ground for the course which had been taken by the prosecutor in that case. That case illustrates very accurately, and very happily, what the law is upon this subject. That is, and has been from the earliest times, admitted to be an exception to the ordinary rule—an exception introduced for this reason, that it is thought that the question, of how far it was proper for a person to have instituted a prosecution, is a question which, call it law or call it fact, is infinitely better entrusted to Judges than to juries. And, therefore, it has been from the very earliest period of time the established doctrine, that the Judge is bound to state (and it is for that purpose made matter of law) whether there was or was not probable cause for that proceeding which is complained of as having been malicious. In order to sustain such an action against a party for having prosecuted maliciously and without probable cause, two things must be made out—that the prosecution was malicious, and that it was without probable cause. Whether it is malicious or not, is purely a question for the jury. Whether there was or was not probable cause, is a question of law for the Judge. To enable the Judge to arrive at a decision upon that question of law, he may, if the circumstances of the case call for it, ask the jury any fact leading or not to a particular conclusion. Did the party do so and so, because, upon your answer "aye" or "no," I come to the conclusion whether there was or was not probable cause. That needs not any authority in the first place, because it is an exception to the ordinary rule. Then, in the next place, it needs no authority, because it is matter of law, and not of fact, that the Judge has to lay down.

The learned counsel has also relied upon the authorities which have established, that where the Court see upon the face of the agreement of partnership that it was part of the original contract that the name of any one of the partners should be concealed, there the contract must be dealt with as illegal. No doubt it requires no authority at all to establish that proposition—it being once established, that to carry on that trade with any partner secretly is an illegal act. The moment that you see on the face of the contract that it was part of the original stipulation that the trade was to be so carried on, you see that which makes the original contract null and void. That is the way in which those cases are explained; and nothing can illustrate it more clearly than the course that one of the cases appears to have taken on the trial, when, it not having been found as a fact that it was part of the original stipulation, the Court of Error held, that that not having been found, it might have been so, or it might not—probably, judging as a jury about it, we should say we have no doubt at all about it. But that is not the course which we are to take—we are merely to say whether there is or is not that which would necessarily lead to that inference. The jury ought to have decided aye or no whether there was such an original stipulation or not; and not having done so, we think that the matter was not properly left to them.

Upon all these grounds, it appears to me that this case is one that admits of no doubt whatever. But I cannot help thinking, from the short and pithy judgment of Lord Ivory, that he must clearly have taken in truth the same view of the case that I should now recommend to your Lordships to take, because he says—"I entirely concur in the opinion of Lord Fullerton, that it is unnecessary to make any addition to it. The only shadow of difficulty which I feel is on the point, whether, if it was for the jury to decide whether there was a partnership or not," (who can doubt that it was?)—"it ought not to have been left to them to find out what were the stipulations of the partnership, instead of their being directed, in point of law, whether or not there could be a partnership." That seems to me to go to the very bottom of the whole question. No doubt it was for the jury so to decide; and if it was a question for the jury to decide, it ought to have been left to them to decide. Accordingly it was so left. The objection is, that the learned Judge did not interpose to tell the jury as matter of law, that they must find in a particular way. In my opinion, the learned Judge at the trial was perfectly right, and the interlocutor which allowed this exception I think therefore was wrong, and ought to be reversed.

Mr. Solicitor-General.—Will your Lordships reverse the interlocutor, and find the appellant entitled to the expenses of the exception in the Court below?

Lord Advocate.—I do not think that those parts of the judgment can be allowed. The other exceptions are undisposed of.

Mr. Solicitor-General.—The others are entirely abandoned. The respondent, instead of choosing to take the judgment of the Court upon each exception, and, if they were disallowed, and improperly disallowed, bringing the judgment up here, abandons all his exceptions, and allows the Court to put their judgment upon the fourth exception alone. Therefore the others are gone.

Lord Advocate.—With very great submission, that is not at all the state of the facts. The other exceptions have not been abandoned. The Court chose to put their judgment upon this as the one upon which there was the greatest unanimity of opinion. There has never yet been a judgment upon the other exceptions. Still I apprehend that we are quite entitled yet to maintain those exceptions.

LORD CHANCELLOR.—What do you propose, Mr. Solicitor-General, as to the exceptions?

Mr. Solicitor-General.—I propose that the order should run in the form which I have suggested to your Lordships. Reverse the interlocutor, repel the exception, and find the appellant

entitled to the expenses in the Court below by reason of that exception—which is exactly the judgment that your Lordships would have pronounced if you had been sitting in the Court of Session instead of the learned Judges whose decision your Lordships have now been reviewing.

Lord Advocate.—In the way that my learned friend now proposes it, I have no objection to it.

LORD CHANCELLOR.—And that the case should be remitted to the Court of Session, allowing to the pursuer the expenses of the fourth exception.

Interlocutor reversed.

First Division. — Robertson and Simson, *Appellant's Solicitors.* — Dean and Rogers, *Respondents' Solicitors.*

MAY 6, 1853.

ARCHIBALD CAMPBELL, *Appellant*, *v.* JOHN LANG, JAMES HUNTER, and THOMAS YOUNG, *Respondents.*

Prescription, Interruption of—Right of Way—Terminus of Highway—Public Place—Issue—Private Statute—*The property of C. was bounded by the Clyde on the north, and the Cart on the west. Along the eastern bank of the latter river, and running from south to north, was a towing path, separated from C.'s property by a hedge. The pursuers, inhabitants of the town of R., on the east of C.'s property, alleged a prescriptive right of public footway across C.'s property to the Cart. In* 1835, *a local statute was passed embodying various matters of contract between C. and the trustees who had formed the towing path, and providing that C.'s property was to be fenced from the towing path by a stone wall to be erected by the trustees.*

HELD, 1. (affirming judgment), *that this statute was no bar to the pursuers' claim of a right of public way.* 2. *That it was a good issue, whether a public way existed to the confluence of two rivers, for the rivers being navigable, the terminus, if not a public place, might lead to a public place.*[1]

Mr. Campbell presented an appeal against the issues approved of by the Court, maintaining —1. That they were inadmissible in the face of the express provisions of the statutes relative to the improvements of the navigation of the river Cart—(27 Geo. III. c. 56, and 5 Will. IV. c. 32.) 2. It is necessary that a public road should have its terminus in a public place; but no public place being proposed to be taken, or being capable of being taken in consistency with the provisions of the statutes referred to, as the terminus, the issues, in so far as relates to the public, were inadmissible. 3. The issues proposed to be taken by the respondents, as inhabitants of Renfrew, were also inadmissible.

The *respondents* maintained in answer—1. The parties being at issue on all material facts, the Court were right in appointing the case to be tried by a jury. 2. In particular—(1.) The objection of the appellant founded on the Cart Navigation Improvement Act, is, with reference to the true meaning of the act, untenable, and, at any rate, depends on matters of fact, which require to be cleared up before the law can be applied; and (2.) The other objections, besides being groundless, cannot be given effect to under the present appeal, in respect they were waived in the Court below, and involve matters which cannot competently be made the subject of appeal.

Sir F. Kelly and *Patton* for appellant.—1. We rely mainly on the statute (5 Will. IV. c. 32) in 1835 as quite extinguishing the right of the public, if any then existed, to the roads in question. Under that statute, there is, and can be, no right of way as claimed. All that the statute authorizes, is a wharf to be erected at the end of the Cart, and the use of it for passengers' luggage is recognized, but nothing in the shape of a road for the public. The 9th section directs a rubble wall, surmounted by an iron railing, to be erected all along the towing-path up to the Clyde, and which is to serve as a barrier separating the path from our lands; and while the statute provides that drains and conduits should be carried through the wall, there is no provision for the public passing; indeed, the very possibility of access is cut off, for the level of the towing path is far below that of the lands. Moreover, the whole space between the rubble wall and the river Cart is directed by the statute to be appropriated to the special purposes of a towing path, and no right of way for the public is consistent with such use. It is said, we ourselves recognized the right of the public to pass over this wall by placing a flight of steps in it; but these were solely for our own use; and as we were not bound by the statute to make these steps,

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[1] See previous report 13 D. 1179; 23 Sc. Jur. 555, 666. S. C. 1 Macq. Ap. 451: 25 Sc. Jur. 393.